

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**DIVISION OF JUDGES**  
**SAN FRANCISCO BRANCH OFFICE**

**E SOURCE COMPANIES, LLC** )  
 )  
 **and** ) Cases: 27-CA-202883  
 )  
 **SHARON COOKSEY, an individual** )  
 )  
 \_\_\_\_\_ )

**E SOURCE COMPANIES, LLC’S**  
**POST-HEARING BRIEF**

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## **RESPONDENT'S POST-HEARING BRIEF**

Respondent E Source Companies, LLC (hereinafter “E Source” or “the Company”) files its Post-Hearing Brief and respectfully shows the following:

### **THE PARTIES**

E Source is a limited liability company that provides focused research and consulting services to utilities and their customers throughout the country. E Source satisfies the NLRB's commerce requirements and does not dispute jurisdiction in this case. The Charging Party Sharon Cooksey (“Ms. Cooksey”) is an individual who was employed by E Source as a Business Development Director (“BDD”) until her employment was terminated on or about March 3, 2017.

### **INTRODUCTION**

Incredibly, during its case-in-chief at the Hearing, the General Counsel offered *no* evidence to demonstrate *who* made the decision to terminate Ms. Cooksey's employment, *when* the decision to terminate her was made, or *why* E Source terminated her employment. In fact, the General Counsel failed to introduce any evidence demonstrating a discriminatory animus by E Source against Ms. Cooksey, or any other E Source employee. What became readily apparent during the General Counsel's case is that the General Counsel's theory was based entirely on circumstantial evidence and conjecture – neither of which support a finding that E Source violated Section 8(a)(1) when it terminated Ms. Cooksey.

While it is undisputed that Ms. Cooksey and other BDDs raised concerns regarding changes made to the Company's compensation plan beginning in early 2016,

there is still no evidence to support the General Counsel's theory that E Source interfered with Ms. Cooksey's Section 7 rights or the Section 7 rights of any other employees. To the contrary, the evidence in the record, including Ms. Cooksey's own testimony, demonstrates that:

- (1) E Source regularly solicited her (and other employees') feedback on employment issues, including regarding the changes that it made to the compensation plan for BDDs,
- (2) E Source consistently thanked Cooksey and others for providing such feedback, and
- (3) E Source made every effort to address the concerns that employees raised. In fact, the Company made four modifications to the 2016 compensation plan during the year – each modification to the benefit of the BDDs.

Significantly, the evidence in the record demonstrates that Michael Hildebrand, the VP of Business Development at the time, told employees *that they should* discuss any concerns that they had regarding the changes to the compensation plan amongst themselves and called multiple meetings to discuss those concerns.

Moreover, the evidence further demonstrated that the decision to terminate Ms. Cooksey's employment was solely made by one person, CEO Wayne Greenberg. As Ms. Cooksey testified, Mr. Greenberg welcomed her feedback on the compensation plan and invited such feedback. Finally, and most notably, the clear and unequivocal evidence in the record demonstrates that Mr. Greenberg made the decision to terminate Ms. Cooksey's employment for one reason and one reason only: her repeated failure to meet her sales targets. There is simply no basis for the General Counsel's case and the Complaint should be dismissed in its entirety.

## **STATEMENT OF CASE**

The General Counsel filed the Complaint in this matter on behalf of Sharon Cooksey who filed an unfair labor practice charge with Region 27 of the National Labor Relations Board (“NLRB” or “the Board”). Ms. Cooksey’s unfair labor charge alleged that E Source terminated her employment with the Company in violation of Section 8(a)(1) of the National Labor Relations Act (“NLRA” or the “Act”).

On October 30, 2017, the General Counsel issued a Complaint and Notice of Hearing (the “Complaint”) in this matter. The General Counsel’s Complaint alleges the following:

- (1) From January 1, 2016 through March 3, 2017, Ms. Cooksey “engaged in concerted activities with other employees for the purposes of mutual aid and protection, by complaining about Respondent's 2016 compensation plan”;
- (2) On about January 24, 2017, E Source issued to Ms. Cooksey a “negative performance review”; and
- (3) On March 3, 2017, E Source terminated Ms. Cooksey.

According to the General Counsel, E Source issued the negative performance review to Ms. Cooksey, and subsequently terminated her, because she engaged in concerted activities protected under Section 7 of the Act. The General Counsel alleges that E Source’s actions violated Section 8(a)(1) of the Act. As will be explained below, the record in this case is devoid of any evidence to support the General Counsel’s allegations.

A hearing was held in this matter in Denver, Colorado on February 20 and 21, 2018. As detailed below, the evidence presented at the Hearing was compelling and



unequivocal and clearly demonstrates that the General Counsel did not meet its burden to establish that E Source engaged in any conduct that violated Section 8(a)(1) of the NLRA. Accordingly, E Source respectfully requests that the General Counsel's Complaint be dismissed in its entirety.

## **STATEMENT OF FACTS**

### **I. E SOURCE.**

E Source is a company headquartered in Boulder, Colorado that is in the business of helping gas and electric utility companies throughout North America. The Company focuses on making the relationship that the utilities have with their customers better. In doing so, E Source performs research, and provides consulting services, in a number of areas for these utility companies, including in all of the following areas: customer research, best practices, benchmarking, and assessment analyses. [TR 332:16–22] E Source employs approximately 90 employees. [TR 332:23-25]

In 2014, E Source hired Wayne Greenberg to serve as the Company's Chief Executive Officer ("CEO"). Mr. Greenberg had previously served as the Company's President from 1996 to 2001. He then returned to serve on E Source's Board of Directors in approximately 2007 before being hired as CEO. [TR 332:5-13]

At the time of his hire in 2014, E Source's ownership specifically tasked Mr. Greenberg with shifting the focus of the Company. For several years prior to his hire, E Source had been focused on maintaining the "status quo" by simply keeping the subscriptions it had, which resulted in little growth. As Mr. Greenberg testified at the Hearing, E Source's ownership was committed to change this:

Q (Respondent's counsel): And when you rejoined E Source in 2014, were you given a certain mandate about by the company's ownership?

A: Yes. The company had, for a period of about four years, been in a specific and stated status quo situation with a renewal-based business essentially selling subscription products. And their strategy at the time was essentially let's just not rock the boat, let's keep what subscriptions we have, and go along at an even keel.

When they hired me to come into the company, there was a very explicit goal, which was to monetize the company as an asset, and that required growth of the company, growth of the terms of revenue, as well as the terms of profitability. So that was my mandate, was to grow the company and then find the best buyer in the marketplace at the opportune time to sell the company.

[TR 333:17 – 334:6; 233:1-234:1] Mr. Greenberg spoke to employees at E Source about the Company's growth strategy and "the need for growth." [TR 349:1–6] Mike Hildebrand, the VP of Sales, also explained to the sales team that E Source was "looking for a lot of growth." [TR 46:9-10]

To achieve this mandate, Mr. Greenberg began to implement a series of changes at E Source. Among other things, under Mr. Greenberg's direction, the Company began to develop a series of new products to offer its customers, which would add to the Company's revenues. The Company hired a team to develop these new products. For example, within months of Mr. Greenberg's start as CEO, E Source launched a brand new area of consulting practice, which has grown considerably over the past few years. E Source also got several new products out to market shortly after Mr. Greenberg took over as CEO in 2014. [TR 334:7 – 335:24]

## II. E SOURCE'S SALES DEPARTMENT.

E Source has a Sales Department, which is responsible for selling the Company's products to its utility customers. In 2014, when Mr. Greenberg became the CEO, the Company's Sales Department had four individuals employed as Business Development Directors. The BDDs are responsible for selling E Source's products. In light of this role, the BDDs were absolutely critical to E Source's goal of achieving substantial growth in the years following Mr. Greenberg's hire. As Mr. Greenberg explained:

Q (Respondent Counsel): And with respect to the mandate that you just talked about, what was the role of the sales department in meeting those goals?

A: It was *everything*. I mean, without a sales team to address the market to push those new products, to push the renewals, to engage the customers with regard to discovering what consulting opportunities and opportunities for growth there are, I mean that is the whole -- that's the tip of the spear. And so for a small company in particular that is driven to grow, *the sales team is an absolutely mission-critical element of the company*.

[TR 336:8 – 337:18 (emphasis added)] While the BDDs were previously focused on maintaining renewals, their main responsibility now shifted to efforts to obtain new customers for E Source. [TR 337:1–8] In approximately December 2015, Mike Hildebrand became the VP of Business Development and began to directly supervise the BDDs. [TR 21:9-13; 228:24-2; 231:8-17] Mr. Hildebrand would hold weekly Monday morning meetings with the sales team, which Ms. Cooksey would usually attend via videoconference. [TR 22:13 – 23:9]

After several months under this new growth strategy, Mr. Greenberg assessed the performance of the Sales Department and made the decision in the summer of 2015 to

terminate two of the four BDDs, Gavin Sullivan and Chuck Ray. Although Mr. Greenberg had concerns with the performance of the other two BDDs, Ms. Cooksey and Christopher Schieffer (“Mr. Schieffer”), he decided not to lay them off at that point in time. Because Ms. Cooksey and Mr. Schieffer were more tenured employees in the Sales Department,<sup>1</sup> Mr. Greenberg decided to give them both more time to “turn the corner” and start driving new sales consistent with the Company’s growth strategy. [TR 336:24 – 338:25]

Following the layoffs of Messrs. Ray and Sullivan, the Company promoted Katie Ruiz from the Company’s Research Department into a BDD position in 2016. Because of her experience in research, Ms. Ruiz had significant knowledge of E Source’s growing product line. [TR 18:14-20] E Source also decreased the number of geographic territories from four to three, which provided each BDD with an expanded territory and additional opportunities for increased sales. In addition, E Source added a new position to the Sales Department in 2015 called Member Experience Manager (“MEM”). The role of the MEMs was to support the BDDs in “getting renewals in order to free up” the BDDs “to go after more new sales.” The intent was that the MEMs would work on the “engagement of the existing clients and work on getting the renewals to come in.” [TR 231:18-232:13, 340:15 – 341:8]

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<sup>1</sup> Mr. Greenberg has known Ms. Cooksey since 1996 when they started work together at another company. [TR 339:1-2]

### **III. THE SALES DEPARTMENT MISSES ITS TARGETS FOR 2015.**

In 2015, the first full year under the Company's growth initiative, the Sales Department failed to meet its performance targets. Despite implementing numerous changes to the Sales Department to encourage additional sales and growth, the performance of the Sales Department was "disappointing." [TR 346:16-19] Mr. Greenberg reviewed financial information regarding the Company's continuing performance on a regular basis. This included documents regarding the performance of the individual BDDs. With respect to Ms. Cooksey's performance in 2015, Mr. Greenberg knew that she had missed her sales targets *by more than a million dollars*. [TR 344:25 – 346:11; 352:19 – 353:9]

As a result of the poor performance of the Sales Department in 2015, the Company implemented more changes that would encourage the BDDs to make more of an effort to drive growth. Amongst these other changes, E Source modified its compensation plan for BDDs for the year 2016. The objective for the 2016 plan was to strongly "incentivize new sales." With the new compensation plan, E Source "wanted to incentivize identifying new customers, and we wanted to, again, try to drive a new ethos in the sales team that was more around new business than existing business." [TR 237:2 – 238:1; 347:21 – 348:2] Based on the changes that had been implemented in the Sales Department, the Company believed that the BDDs could be successful at driving new business and, therefore, reach the goals created by the new plan. As Mr. Greenberg testified:

Q (Respondent Counsel): And with the changes that were ultimately made to the 2016 compensation plan, did you believe the BDDs could be successful?

A: I did believe that.

Q: And why is that?

A: As, again, a CEO, my goal is to align as many -- as many of the forces as possible together so that we can achieve joint goal. And so it would've been completely against my own interest to do anything other than try to create a plan that I thought would have satisfied them.

[TR 348:3–12] Significantly, the 2016 compensation plan for BDDs did not have any limitations on the amounts that the BDDs could make. This was intended to motivate the sales team to work to drive growth. [TR 348:13–25]

In late December 2015 and early January 2016, Mr. Hildebrand began meeting with BDDs to inform them of the impending changes to the compensation plan. [TR 239:1-3] Mr. Hildebrand met with Ms. Cooksey to discuss the new 2016 compensation plan. [TR 32:19 – 33:3] During the meeting, Mr. Hildebrand described the plan to Ms. Cooksey and explained he wanted to give her an idea of what to expect. However, he also explained that the plan had not yet been finalized. [TR 33:4-15] He also held at least one group meeting in which he tried to answer the BDDs' questions about the new plan. During these meetings, Mr. Hildebrand solicited their input on the proposed changes and told them he appreciated their feedback. [TR 240:6–17]

Ms. Cooksey ultimately received the new compensation plan on or about January 27, 2016 and signed it a few days later. [TR 34:2-21] The 2016 compensation plan changed how the BDDs would earn commissions. Under the new plan, the BDDs would

receive the same percentage regardless if the sale was earned through renewal, new or consulting business. [TR 34:24 – 35:12] That percentage would increase over the course of the year as sales thresholds were met, resulting in much higher percentage commissions for renewals than in the past as well as continually increasing percentages for each new sale and each consulting sale. [TR 34:2–10; GC 6] The 2016 compensation plan set forth a new “hurdle,” or sales target for Ms. Cooksey. [TR 29:25–30:5] The sales targets established for each BDD were based on a number of factors, including the number of customers in their respective territories and the amount of existing business that would be renewed annually. [TR 242:9 – 234:6] With an over twenty-year historic renewal rate of 85% or better, the BDDs were reasonably well assure of these renewals. [357:6-18]

After Mr. Hildebrand met with the BDDs individually to discuss the terms of the proposed compensation plan, Ms. Cooksey met with the two other BDDs, Mr. Schieffer and Ms. Ruiz, to discuss the proposed plan. At the time, Mr. Hildebrand specifically told the BDDs that they “*could talk among themselves*” about the plan and encouraged them to do so. [TR 42:11-43:1; 240:18 – 241:4 (emphasis added)] After the written plan was provided to the BDDs in late January 2016, they continued to discuss the plan and various scenarios under the plan. Ms. Cooksey testified that she and the other BDDs were regularly having discussions about the compensation plan in the Spring of 2016:

Q (GC): And were these discussions occurring in person, or by phone, or how were they occurring.

A: Some were in person, if I was in Boulder and they were both there. We would talk about it and try to come up with scenarios on what we

thought would -- how it was going to work. Sometimes, if we had had a meeting -- we had meetings with Mike periodically, just regular team check-in meetings that were not the Monday morning meeting, and *he told us if we had questions or concerns on the comp plan, we could ask him or bring our ideas to him. And so it was kind of an open discussion.* And we would always talk afterwards to, you know, try to get an understanding of what he was telling us.

[TR 43:24 - 44:10 (emphasis added)] The three BDDs had discussions with Mr. Hildebrand regarding the compensation plan often after it was rolled out. [TR 47:7–20; 245:13-246:4] Mr. Hildebrand also encouraged her to keep a spreadsheet regarding her compensation under the new plan and told her she could share it with him. [TR 48:5-10] As a result of these discussions, E Source made certain changes to Ms. Cooksey's compensation plan in March 2016, such as raising her commission rate and lowering her targets, which benefitted her. [TR 105:1 – 106:16; 246:10-22; 248:4 – 25; GC 6, 7]

In May and June, Christopher Doyle, the Company's Chief Operating Officer ("COO"), invited the BDDs – Ms. Cooksey, Mr. Schieffer and Ms. Ruiz – to meet with him so he could get a better understanding of the compensation plan. [TR 51:3-17] Following these meetings, Mr. Doyle *thanked* Ms. Cooksey for the information that she had provided. [TR 54:19-25]

In September 2016, Mr. Hildebrand held a team meeting that included the three BDDs and Maureen Russolo, the VP of Consulting. During the meeting, the group provided ideas on changes that they could propose to the compensation plan for the following year. According to Ms. Cooksey, the "whole team" was advocating for certain changes to the plan.



In November 2016, Mr. Greenberg invited the sales team to participate in a meeting to discuss 2017 – “changes to the comp plan, getting our feedback, letting us submit ideas.” Ms. Cooksey stated that Mr. Greenberg described the meeting as an “open, round-table discussion, so we could come up with a better plan that we were under in 2016.” All three of the BDDs provided their feedback on the current plan during the meeting. [TR 74:4 – 75:21] During the meeting, both Mr. Greenberg and Mr. Doyle agreed that the 2016 plan “needed to be changed.”<sup>2</sup> [TR 77:4–8]

**IV. MR. GREENBERG MAKES THE DECISION TO TERMINATE MS. COOKSEY.**

In 2016, E Source’s growth was 1.6%, which was significantly below the Company’s targets. The slow growth required E Source to max out its credit line. As a result, Mr. Greenberg was forced to make the decision to layoff several more E Source employees. In approximately August or September 2016, Mr. Greenberg personally selected the seven individuals to be included in the layoff, which took place in October 2016. Although Mr. Greenberg decided to include Ms. Cooksey and Mr. Schieffer in the October 2016 layoff, he ultimately decided to delay their separations. In reaching the decision to delay the layoff both Ms. Cooksey and Mr. Schiffer, Mr. Greenberg testified:

Q (Respondent Counsel): Ultimately, you decided not to lay them off, including Ms. Cooksey and Mr. Schieffer, in the layoff in October of 2016?

A: That's correct. That was my decision.

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<sup>2</sup> Ms. Cooksey testified that only one member of management, Judy Lindenmeyer, appeared “visibly upset” during the meeting. Of course, there is no evidence in the record to suggest or imply that Ms. Lindenmeyer had any role whatsoever in the January 2017 performance evaluation or the decision to terminate Ms. Cooksey.

Q: And why was that?

A: Because we were coming into our biggest renewal time of the year, which is the fourth quarter and first quarter. And while they were not doing a good job in my view at selling new material, we still were doing an okay job at renewal. And my decision was it was better to have those positions occupied than vacant during our peak renewal season.

[TR 351:12–22]

In reaching his decision to layoff Ms. Cooksey, Mr. Greenberg noted that he continuously had been reviewing Ms. Cooksey's sales numbers and knew that, for the year 2015, she had missed her sales targets "by 20 percent or more" or by \$1.25 million. He also could project that, without significant changes in behavior, she was likely going to miss her 2016 goal by at least \$1 million, which is exactly what happened. [TR 352:19-25, GC 34] Mr. Greenberg reviewed the Company's sales financials, which were completed through the August/September 2016 timeframe. *Mr. Greenberg testified unequivocally that he only considered E Source's finance documents in reaching his decision to terminate Ms. Cooksey.*<sup>3</sup> [TR 353:9 – 354:19, GC Ex. 34]

After the decision to lay Ms. Cooksey off was made by Mr. Greenberg, Mr. Hildebrand and Jess Davis, the Company's HR Director, attempted to convince him to keep Ms. Cooksey. [TR 355:14–23: R 2] Mr. Hildebrand's efforts to lobby to keep Ms.

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<sup>3</sup> As will be explained below, Mr. Greenberg did not participate in the evaluation process for Ms. Cooksey and did not consider, or even see, the performance evaluation completed by Mike Hildebrand in January 2017 prior to the filing of her unfair labor practice charge. [TR 351:23 – 352:12]

Cooksey continued until a week to ten days prior to her actual termination date. [TR 355:20-23]

Ultimately, Mr. Greenberg decided to lay Ms. Cooksey and Mr. Schieffer off in March 2017 after the Company had made it through its key renewal season. [TR 355:4-13] They were not the only two employees laid off at the time. As part of his continuing evaluation of the Company's performance and operations, Mr. Greenberg also decided to terminate two other employees in the Company's Research Department. [TR 94:6-9; 355:24-356:4]

### **WITNESS CREDIBILITY**

Unlike many Section 8(a)(1) cases involving employee terminations, this case does not hinge largely on credibility determinations. As detailed above, the General Counsel failed to produce any evidence to show that E Source's decision to terminate Cooksey was because she engaged in protected, concerted activities. Nonetheless, as will be addressed below, the testimony of the General Counsel's two witnesses – Sharon Cooksey and Christopher Schieffer – poses serious credibility questions in a handful of notable areas.

As the Board has recognized, credibility determinations rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *See, e.g., Aliante Station Casino & Hotel*, 358 NLRB No. 153, slip. op. 79-80 (Sept. 28, 2012); *Double D Construction*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001).

The ALJ should reject the testimony of Ms. Cooksey and Mr. Schieffer on the following topics, among others:

**Ms. Cooksey**

**1. Ms. Cooksey's testimony that she believed she had met her 2015 sales targets should be rejected.**

Although not necessarily relevant, Ms. Cooksey testified at the Hearing that she believed she had met her 2015 sales targets. Ms. Cooksey testified that she believed her sales target for 2015 was only \$4,002,409 and that her sales had exceeded that goal. Her testimony was based on numbers included in her 2015 year-end performance appraisal, which was prepared by her interim supervisor, Chris Doyle. However, the sales target on the 2015 year-end evaluation did not constitute her sales target *for the entire year*, but only that portion covered by the evaluation. [TR 60:11 – 61:16; GC 12] Her sales target for the year 2015 was significantly higher at \$5,482,985 and Ms. Cooksey missed the target by a significant amount. [GC 34] Her testimony on this point should be rejected.

**2. Ms. Cooksey's testimony that Mr. Hildebrand did not talk to her about her lack of product knowledge.**

Although Ms. Cooksey testified that she met with Mr. Hildebrand to go over her 2016 mid-year and year-end evaluations, she denied that Mr. Hildebrand ever addressed any concerns he had about her lack of product knowledge. [TR 113:1 - 20] In both reviews, Mr. Hildebrand addressed the need for Ms. Cooksey to gain better knowledge of the Company's growing product line. [GC 13, 18] Moreover, Mr. Hildebrand credibly testified that he spoke to Ms. Cooksey (and Mr. Schieffer) about their lack of "in-depth knowledge of each of the product lines." [TR 251:4 – 23] In light of Mr. Hildebrand's

testimony, the clear documentary evidence showing that Mr. Hildebrand addressed her lack of product knowledge in multiple evaluations, and Ms. Cooksey's acknowledgment that Mr. Hildebrand specifically went over the evaluations with her, Ms. Cooksey's denial does not make sense and must be rejected.

**Mr. Schieffer**

Although most of Mr. Schieffer's testimony was irrelevant to the General Counsel's case, he did testify concerning his interactions with Mr. Hildebrand regarding the plan. Consistent with the testimony from Ms. Cooksey, Mr. Schieffer testified that Hildebrand specifically told him "you know you can talk to your colleagues about" the changes to the compensation plan, which Mr. Schieffer did frequently do. [TR 160:3 – 161:1] However, Mr. Schieffer claimed that at some point in March Mr. Hildebrand told him *not* to discuss the compensation plan any more. Although Mr. Schieffer provided detailed testimony on many subjects, Mr. Schieffer could not recall when Mr. Hildebrand communicated this message to him or the context of the communication from Mr. Hildebrand. [TR 163:23 – 164:14] On cross-examination, Mr. Schieffer was even more evasive concerning the alleged communication from Mr. Hildebrand. [TR 206:19 – 207:7] Mr. Schieffer's testimony on this point should be discredited.

In the face of the significant testimony on the record, including his own testimony and the testimony of Ms. Cooksey, demonstrating that Mr. Hildebrand specifically told the employees that they *could* talk about the compensation plan, Mr. Schieffer's testimony makes no sense. He fails to offer any explanation as to why Mr. Hildebrand would suddenly do an about-face. Nor could he provide any context for the conversation.

Although he testified he believed the conversation occurred in March, he could not provide the most basic details about it. Significantly, he continued to have discussions with the other BDDs and management well beyond March without any repercussion. Mr. Schieffer's testimony on this point is too incredible and should be rejected.

### **ARGUMENT**

The General Counsel bears the burden of establishing each element of its contention that the Respondent violated the Act. *See, e.g., KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975). That "burden never shifts, and ... the discrediting of any of Respondent's evidence does not, without more, constitute affirmative evidence capable of sustaining or supporting the General Counsel's obligation to prove his case." *Id.*; *see also NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966) ("The mere disbelief of testimony establishes nothing.") As set forth below, the General Counsel has not satisfied his burden.

With respect to the General Counsel's Section 8(a)(1) allegations, the framework adopted by the General Counsel in *Wright Line* should be applied. *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981). *See also NLRB v. Transportation Mgt.*, 462 U.S. 393, 399 (1982); *Amoco Fabrics Co.*, 260 NLRB 336, 344 (1982). Under the *Wright Line*, the General Counsel must initially make a *prima facie* showing sufficient to support the inference that protected conduct was a substantial or motivating factor in the employer's decision to discipline, discharge, or enforce its work rules. To establish a *prima facie* case under *Wright Line* and its progeny, the General Counsel has the burden to prove that (1) the discriminatee's actions were concerted, (2)

the decision-maker knew about the concerted activity, (3) the discriminatee's actions were engaged in for the mutual aid or protection or were otherwise protected by Section 7 of the Act, and (4) the discriminatee's participation in protected, concerted activity was a substantial or motivating reason for the adverse employment action. *See, e.g., Amelio's*, 301 NLRB 182 (1991), *citing Meyers Industries*, 268 NLRB 493 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948, 971 (1985), *on remand* 281 NLRB 882 (1986), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

If the General Counsel succeeds in creating a presumption that the adverse action violated the Act, the employer then bears the burden to prove that the same action would have taken place even in the absence of the protected conduct. *Id.* To rebut the presumption, an employer “must only show that it reasonably believed” that the employee engaged in conduct warranting the adverse employment action. *Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995), *GHR Energy Corp.*, 294 NLRB 1011, 1012-13 (1989), *aff'd*, 924 F.2d 1055 (5th Cir. 1991).

Further, if the employer establishes its affirmative defense, the General Counsel bears the burden of rebutting the defense. If the employer “goes forward” with evidence supporting its affirmative defense, the General Counsel “is further required to rebut the employer's asserted defense by demonstrating that the challenged adverse action would not have taken place in the absence of the employee's protected activities.” *Comcast Cablevision*, 313 NLRB 220, 253-54 (1993); *St. Luke's Hospital*, 312 NLRB 425, 439 (1993). Even if a disciplinary action appears extreme, it does not follow that the

proffered reason for the action is pretextual. Simply put, if an improper motive is not involved, the question of proper discipline of an employee is a matter “left to the discretion of the employer” which may discharge an employee for “a good reason, a bad reason, or no reason at all.” *Gossen Company*, 254 NLRB 339, 355 (1981), *enforced in part, denied in part*, 719 F.2d 1354 (7th Cir. 1983); *NLRB v. Meinholdt Manufacturing, Inc.*, 451 F.2d 737, 739 (10th Cir. 1971). *See also, Goldtex, Inc. v. NLRB*, 14 F.3d 1008, 1011 (4th Cir. 1994) (“[u]nwise and even unfair decisions to discharge employees do not constitute unfair labor practices unless they are carried out with the intent of discouraging participating in union activities”); *West Covina Disposal*, 315 NLRB 47, 64 (1994) (deferring to employer’s “business judgment” that employee should be discharged). As such, “it is not for the Board to substitute its judgment for that of an employer in deciding what are good or bad reasons” for taking an adverse action. *Kellwood Company*, 299 NLRB 1026, 1040 (1990); *Central Freight Lines*, 255 NLRB 509, 510 (1981), *enforced*, 666 F.2d 238 (5th Cir. 1982). *See also Ryder Distribution Resources, Inc.*, 311 NLRB 914, 816 (1993).

As discussed fully below, the General Counsel failed to satisfy even his initial burden under *Wright Line*. To begin with, the General Counsel failed to offer any evidence to demonstrate that the sole individual involved in the decision to terminate Ms. Cooksey’s employment – CEO Wayne Greenberg – had any discriminatory animus towards her participation in any protected, concerted activities. To the contrary, the evidence in the record demonstrates that Mr. Greenberg welcomed employee feedback on workplace issues, including, but not limited, to input on the compensation plan for the



BDDs. Moreover, even if the General Counsel could point to any evidence of a discriminatory animus on the part of Mr. Greenberg, the overwhelming evidence demonstrates that the decision to terminate Ms. Cooksey was for a legitimate, non-discriminatory reason wholly unrelated to any Section 7 activity. Finally, assuming the General Counsel could get beyond the substantial deficiencies in his case-in-chief (which he cannot), he did not introduce any evidence to demonstrate that Mr. Greenberg's decision to terminate Ms. Cooksey for continued failure to meet her annual sales targets was pretext for unlawful retaliation under Section 8(a)(1) of the Act. The General Counsel's allegation regarding the "negative" performance review likewise fails.

**V. THE GENERAL COUNSEL'S ALLEGATION THAT MR. HILDEBRAND ISSUED MS. COOKSEY A "NEGATIVE" PERFORMANCE REVIEW IN VIOLATION OF SECTION 8(a)(1) SHOULD BE DISMISSED.**

In the Complaint, the General Counsel alleges that, about January 24, 2017, "Respondent issued the Charging Party a negative performance review." [Complaint at ¶ 4(b)] The General Counsel further alleges that E Source issued the "negative performance review" because Ms. Cooksey had engaged in concerted activities with other employees for the purposes of mutual aid or protection at various dates between January 1, 2016 and March 3, 2017.<sup>4</sup> [Complaint at ¶ 4(c)] For the reasons explained below, the General Counsel's allegation should be dismissed.

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<sup>4</sup> Notably, the General Counsel has not separately alleged that Mr. Hildebrand's comments in the 2016 year-end evaluation constituted unlawful rules or directives.

The General Counsel's allegation regarding the 2016 year-end evaluation is based entirely on a handful of innocuous comments made by Mr. Hildebrand in the evaluation. Specifically, the General Counsel focused on the following comments during his case:

i. Category: Collaboration and Teamwork

"What hurts the achievement some of team collaboration with the complaint about the comp plan. She could have helped the teams attitude in this touchy situation by taking a different, more positive approach."

ii. Category: Can-Do Attitude

"On the flip side there was one main thing that Sharon did that was a detriment to her attitude and the attitude of others was the open complaining about the comp plan.

I know she has bent Carolyns (sic) ear numerous times, and has also openly complained in the sales meeting a couple of times, once where she said "I made \$200k last year and not going to make that this year." I had a couple people after that meeting call me and were quite upset that she made that much in comparison to what they make and was complaining about it. There was major damage control that needed to be done because of that."

[GC 18] As will be explained below, there is no evidence to demonstrate, or even suggest, that these comments were made to discourage Ms. Cooksey from engaging in concerted activities. To the contrary, the credible evidence in the record shows that Mr. Hildebrand made these comments to specifically address the disruptive manner in which Ms. Cooksey raised certain issues with her co-workers.

As an initial point, contrary to the General Counsel's allegation that the 2016 year-end evaluation was a "negative" review, Ms. Cooksey testified that she believed it was, in fact, a "good review." When Counsel for the General Counsel asked Ms. Cooksey whether she interpreted the review to "to be a negative review or a positive review," Ms.

Cooksey specifically replied that she thought “it was a *good* review...” [TR 87:3-6 (emphasis added)] Overall, Mr. Hildebrand gave Ms. Cooksey a rating of “3.4,” which is between “meets expectations” and “exceeds expectation.” [GC 18] Significantly, this is only one-tenth of a percentage point less than the “3.5” rating that Ms. Cooksey gave herself during the mid-year 2016 review, a rating which she agreed was a “fairly good rating.” [TR 112:2–20, GC 13] Notably, Mr. Hildebrand also gave Ms. Cooksey an overall rating of “3.5” on the mid-year 2016 performance review, so his rating on the year-end evaluation was only slightly below the overall rating he gave Ms. Cooksey on the previous evaluation.

Moreover, the General Counsel failed to introduce any evidence that Ms. Cooksey’s terms and conditions of employment were negatively impacted by Mr. Hildebrand’s comments in the evaluation. As will be addressed below, the clear and undisputed testimony demonstrates that Wayne Greenberg – the sole decision-maker for the decision to terminate Ms. Cooksey – did not see the 2016 year-end evaluation prior to Ms. Cooksey’s filing of her unfair labor practice charge. In fact, Mr. Greenberg testified that he made the decision to terminate Ms. Cooksey’s employment *months before* Mr. Hildebrand prepared the 2016 year-end evaluation. [TR 351:12–22]

In addition, there is no evidence that Mr. Hildebrand had any animus towards Ms. Cooksey or the other employees who had raised concerns about the changes to the compensation plan dating as far back as late 2015. To the contrary, the undisputed evidence in the record demonstrates that Mr. Hildebrand repeatedly solicited feedback and input from Ms. Cooksey and other employees about the compensation plan and other

workplace issues and *thanked them* for their input. Among the many examples in the record, Mr. Hildebrand testified:

Q (Respondent Counsel): Did, in those discussions, did the BDDs voice any concerns about the 2016 plan?

A: Yes, they did.

Q: Who did that?

A: Sharon, Christopher and Katie.

Q: What did you do in response to those concerns?

A: Certainly, I'm the kind of person, and I think E Source as a whole, that input is certainly accepted and welcomed. So we took that into consideration. We actually did make some tweaks to the plan, there were like some sales bonus things for year end. I know we made some small changes there. But I will say that part of the reason that we're asking for input on a continuous basis is we knew that next year's plan was also something we'd have to look at modifying. So, I was very purposeful in getting input in 2016 on the 2017 plan. Because I was more involved, I guess you could say, and had more time to do that. So, that was a very proactive approach in getting input from the team on that.

Q: Did you encourage those conversations?

A: I did. Actually, I scheduled meetings. I know we had -- probably a meeting I scheduled -- August? I know it was summer. August where there was the BDDs, I had Judy come and I said, "Let's talk about your thoughts on the comp plan and what we should change for 2017." So that was how we kicked things off very early. Because I know the previous year's plan got out 12th or 11th hour, I guess you can call it. But we wanted to get that well, well out. Way before -- input way before that for the 2017 plan.

[TR 246:5 – 247:7] Ms. Cooksey's own testimony confirms that Mr. Hildebrand encouraged employees to discuss their concerns regarding changes to the compensation plan both with management and amongst themselves. [TR 42:11-43:1]

As Mr. Hildebrand explained during his testimony, he included the comments regarding Ms. Cooksey's complaints about the compensation plan not simply because she had raised concerns, but instead because of the *manner* in which she was raising those concerns and the impact that her comments were having on her co-workers. When describing why he included the comment under the "Teamwork and Collaboration" category, Mr. Hildebrand testified:

Q: Why did you include that comment?

A: So again, this is under teamwork and collaboration. And with the comp plan being a sensitive issue to everyone, I certainly welcomed the input on the plan as we stated earlier. But it was truly, I think, the manner in which it was presented. Which really hurt team morale. So it wasn't even, I use the word complaining, about the comp plan. It was just really more in which the manner it was brought up that was detrimental to the team morale and the teamwork.

Q: And what specifically do you mean by manner?

A: Being brought up in a non-constructive fashion...

[TR 256:11-21]

Moreover, with respect to Mr. Hildebrand's comments under the "Can-Do Attitude" category, Mr. Hildebrand testified that he specifically recalled being surprised when Ms. Cooksey stated she "made \$200,000 last year" during a meeting with several other employees. According to Mr. Hildebrand, two specific employees, Maureen Russolo and Dawn Arnold, came to him and threatened to quit after hearing how much Ms. Cooksey made in comparison to their compensation. [TR 257:9 – 258:11] He further testified that another co-worker, Carolyn Doyle, complained to him that Ms.

Cooksey was “talking a lot about the comp plan and *it’s kind of detrimental to our working relationship.*”<sup>5</sup> [TR 258:12-21 (emphasis added)]

While Ms. Cooksey denied ever making a comment about how much she made to other co-workers or bothering Ms. Doyle with the way she discussed her concerns about the compensation plan, her testimony should be discredited. The General Counsel failed to offer any other explanation as to why Mr. Hildebrand would include these comments in the 2016 year-end evaluation. As previously noted, and consistent with the General Counsel’s own allegations, Ms. Cooksey had been raising these same concerns for over a year prior to Mr. Hildebrand issuing the performance evaluation to her in January 2017. No similar comments appear in any of the previous performance evaluations that Mr. Hildebrand prepared for Ms. Cooksey in 2016. Furthermore, the General Counsel offered no evidence that Mr. Hildebrand ever told Ms. Cooksey that she could not raise any concerns she had about the compensation plan (or any other term or condition of employment) and Mr. Hildebrand specifically denied doing so. [TR 257:1–4]

For these reasons, the General Counsel’s allegation regarding the allegedly “negative” performance evaluation that Ms. Cooksey received on or about January 24, 2017 must be dismissed.

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<sup>5</sup> Ms. Cooksey did acknowledge that she talked “generalized percentages with the team,” but denied that she ever told co-workers her precise compensation. [TR 116:13 - 117:7]

**VI. THE GENERAL COUNSEL’S ALLEGATIONS THAT E SOURCE TERMINATED MS. COOKSEY BECAUSE SHE ENGAGED IN PROTECTED CONCERTED ACTIVITIES IN VIOLATION SECTION 8(a)(1) MUST BE DISMISSED.**

In his Complaint, the General Counsel alleges that, on or about March 3, 2017, E Source terminated Ms. Cooksey because she engaged in concerted activities in violation of Section 8(a)(1) of the Act. In asserting this allegation, the General Counsel failed to introduce any direct evidence regarding E Source’s decision to terminate Ms. Cooksey. Significantly, in the General Counsel’s case-in-chief, he failed to produce any evidence to establish all of the following facts, which are critical to his *prima facie* case: (1) *who* made the decision to terminate Ms. Cooksey, (2) *when* the decision was made to terminate Ms. Cooksey, or (3) *why* E Source made the decision to terminate Ms. Cooksey’s employment. In the absence of those critical elements, the General Counsel appears to rely solely on one piece of irrelevant evidence – a few comments made in Ms. Cooksey’s 2016 year-end performance evaluation – to establish a discriminatory animus. However, in doing so, the General Counsel ignores several undisputed facts, including the fact that the decision to terminate was made entirely by Wayne Greenberg who neither prepared nor reviewed the 2016 year-end performance evaluation. For the reasons explained below, the General Counsel’s allegation regarding Ms. Cooksey’s termination is without merit and must be dismissed.

**a. The General Counsel Did Not Establish a *Prima Facie* Case under *Wright Line*.**

**i. The Undisputed Evidence Establishes that Mr. Greenberg Was the Sole Decision-Maker for the Decision to Terminate Ms. Cooksey's Employment.**

As noted above, at the Hearing, the General Counsel offered no evidence as to who at E Source made the decision to terminate Ms. Cooksey's employment. E Source, however, produced clear, incontrovertible evidence that the Company's CEO, Wayne Greenberg, was the *sole* individual responsible for the decision to terminate Ms. Cooksey's employment. Mr. Greenberg's testimony was unequivocal on this point:

Q: And were any of the employees in the sales department laid off in October of 2016?

A: They were not.

Q: Did you consider laying off any employees in the sales department?

A: We both considered and actually made the decision to lay them off. We just chose to wait to make the second layoff.

Q: And who did you consider laying off in October 2016?

A: Sharon Cooksey and Christopher Schieffer.

Q: And was that your decision?

A: *One hundred percent.*

[TR 350:9-19 (emphasis added)]



Consistent with this testimony, Mr. Hildebrand specifically testified that he did not make the decision to terminate Ms. Cooksey's employment.<sup>6</sup> [TR 271:3-6; 321:7-8; 322:3-14] In fact, the evidence in the record demonstrates that Mr. Hildebrand tried to convince Mr. Greenberg *not* to terminate Ms. Cooksey in January 2017 and continued to try to change Mr. Greenberg's mind until shortly before the date the decision was communicated to Ms. Cooksey. [R2; TR 355:14–23]

**ii. The General Counsel Did Not Produce Any Evidence to Show that the Decision to Terminate Ms. Cooksey Was Motivated by a Discriminatory Animus.**

As required by *Wright Line*, the General Counsel has the burden to demonstrate that Ms. Cooksey's participation in protected, concerted activity "was a substantial or motivating reason" for the adverse employment action. *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981). The record is devoid of *any* evidence to demonstrate that Mr. Greenberg had a discriminatory animus towards Ms. Cooksey because of her participation in protected, concerted activities. In fact, Ms. Cooksey testified that she and Mr. Greenberg were on such good terms that she could speak with him about sensitive family matters that he was experiencing. [TR 55:4 – 56:2; 365:23 – 366:7]

As an initial point, the General Counsel alleges that Ms. Cooksey, along with the other BDDs, openly engaged in concerted activities relating to the comp plan beginning as early as December 2015. However, the General Counsel's theory fails to explain why

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<sup>6</sup> Mr. Hildebrand testified that, after Mr. Greenberg made the decision, Mr. Greenberg had Mr. Hildebrand *inform* Ms. Cooksey of the decision, which is the Company's customary practice. [TR 270:18 – 271:2]

E Source allowed Ms. Cooksey to engage in protected, concerted activities for well over a year before suddenly deciding to terminate her employment. Of course, that is because there is no evidence in the record to show that E Source – and specifically Mr. Greenberg – had any issue or concern with Ms. Cooksey’s protected, concerted activities. To the contrary, the record is replete with evidence showing that Mr. Greenberg *encouraged* Ms. Cooksey and other employees to engage in Section 7 activities and to specifically discuss their compensation plan.

Significantly, Ms. Cooksey testified at length regarding Mr. Greenberg’s efforts to seek their input and ideas regarding changes to the compensation plan. Specifically, Ms. Cooksey described how Mr. Greenberg invited the sales team to participate in a meeting to discuss 2017 – “changes to the comp plan, getting our feedback, letting us submit ideas.” Ms. Cooksey further described that Mr. Greenberg described the meeting as an “open, round-table discussion, so we could come up with a better plan that we were under in 2016.” [TR 74:4 – 75:21] Similarly, Christopher Schieffer also testified that he had an “open discussion” with Mr. Greenberg regarding the compensation plan and other issues that he described as “very positive.” [TR 167:24 – 168:18]

The only evidence offered by the General Counsel regarding any opposition to the concerns raised by Ms. Cooksey about the compensation plan is the few comments made by Mr. Hildebrand in the 2016 year-end evaluation issued in January 2017. However, the evidence is clear that Mr. Greenberg never saw the 2016 year-end performance evaluation and certainly did not consider it in making his decision to terminate Ms.

Cooksey's employment.<sup>7</sup> [TR 351:23 – 352:12] The General Counsel simply produced no evidence to demonstrate that Ms. Cooksey's protected, concerted activity "was a substantial or motivating reason" for E Source's decision to terminate her employment.

**b. The Evidence Demonstrates that E Source Had a Legitimate, Non-Discriminatory Reason for Ms. Cooksey's Termination.**

Even if the General Counsel had established its *prima facie* case (which he did not do), the overwhelming evidence in the record demonstrates that E Source had a legitimate, non-discriminatory reason for Ms. Cooksey's termination: Ms. Cooksey's repeated failure to meet her sales targets and help E Source meet its goal of substantial growth. Once again, the evidence on this point is clear and incontrovertible.

The testimony at the Hearing established the changes that occurred at E Source following the Company's hiring of Wayne Greenberg as CEO in 2014. Consistent with the mandate given to Mr. Greenberg by the Company's ownership, E Source immediately adopted an aggressive approach towards growth. This new approach had substantial impact on the Sales Department, including the introduction of a number of new products and consulting services, which the BDDs were expected to learn and sell. [TR 334:7 – 335:24] In 2015, this change in focus resulted in the layoff of two of the four BDDs. Although Mr. Greenberg considered laying off Ms. Cooksey and the other BDD, Christopher Schieffer, at the time, he decided to give them both additional opportunities to show whether they could successfully perform under the new growth strategy. [TR

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<sup>7</sup> Moreover, to the extent the General Counsel believes that Mr. Hildebrand's comments in the 2016 year-end evaluation support a finding that E Source had a discriminatory animus, this theory should be rejected in light of the evidence that *Mr. Hildebrand actually sought to convince Mr. Greenberg to change his decision to terminate Ms. Cooksey.*

336:24 – 338:25] Ultimately, Ms. Cooksey failed to meet her sales targets for 2015. Although her sales targets for 2015 were higher than in years past, in light of the changes to the Sales Department, the sales target was certainly attainable. [TR 352:19-25, GC 34] In order to achieve those higher targets, the BDDs were provided with a number of new opportunities: a larger sales territory with a greater volume of existing renewals and more targets for new business; a new consulting practice with multiple offerings; an additional person in each territory (the MEM) to focus on customer engagement and renewals; a robust new product engine. [TR 231:18 – 232:13; 334:7 – 335:24]

In light of the poor performance of the Sales Department in 2015, the Company struggled financially and was forced to max out its credit line. As a result, Mr. Greenberg was forced to make the decision to layoff several more E Source employees. In approximately August or September 2016, Mr. Greenberg personally selected seven individuals to be included in the layoff, which took place in October 2016. Although Mr. Greenberg decided to include Ms. Cooksey and Mr. Schieffer in the October 2016 layoff, he ultimately decided to delay their separations to allow them to focus on the upcoming renewal season. [TR 351:12–22] Mr. Greenberg credibly testified regarding his initial decision to terminate Ms. Cooksey prior to the October 2016 layoff:

Q: And who did you consider laying off in October 2016?

A: Sharon Cooksey and Christopher Schieffer.

Q: And was that your decision?

A: One hundred percent.

Q: And why were you considering laying them off at that point in time?

A: 1.6 percent sales growth. I mean, again, the sales report card told it all. We were not meeting our numbers. We were not even coming close to meeting our numbers. And so it was my decision at that point in time that we needed to make a change. *In fact, I felt that if I didn't make that change, that I was putting myself at risk, that I would be essentially malfeasance not to take action.*

[TR 350:16 - 351:3(emphasis added)]<sup>8</sup>

Following the renewal season, Mr. Greenberg made the decision to proceed with the additional layoffs in March 2017. In addition to Ms. Cooksey, Mr. Greenberg decided to terminate Mr. Schieffer and two employees in the Company's Research Department. [TR 94:6-9; 355:24 – 356:4] Regarding this decision, Mr. Greenberg testified:

Q: And why did you make the decision ultimately for a March layoff?

A: Because, again, the primary renewal season is for us November, December, January, February and we wanted to get through the renewal. And there's a long debate then and, you know, the literature ratchet. You have a vacant position or someone who's not performing in the position, and my judgment was because it was the renewal business we wanted to preserve during that period of time, that it (*sic*) felt that was the right move to make on behalf of the company.

[TR 355:3–13] Mr. Greenberg further testified that, in reaching his decision, he considered only one thing, the Company's "finances," which were captured in a document that he regularly reviewed. [TR 354:13 – 22, GC 34]

As the Board has long recognized, if an improper motive is not involved, the question of proper discipline of an employee is a matter "left to the discretion of the

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<sup>8</sup> Mr. Greenberg credibly testified that he did not consider including the third BDD, Katie Ruiz, in the layoff at that point because she was brand new in the role and she had extensive product knowledge based on her past experience in the Research Department. [TR 351:4-11]

employer” which may discharge an employee for “a good reason, a bad reason, or no reason at all.” *Gossen Company*, 254 NLRB 339, 355 (1981), *enforced in part, denied in part*, 719 F.2d 1354 (7th Cir. 1983). In the instant case, the overwhelming evidence in the record demonstrates that E Source had a legitimate, non-discriminatory reason for Ms. Cooksey’s termination. The General Counsel’s allegation regarding Ms. Cooksey’s termination must be dismissed.

### **CONCLUSION**

Because the General Counsel has failed to satisfy his burden to establish any of the other unfair labor practice allegations asserted against E Source, the General Counsel’s Complaint against E Source must be dismissed in its entirety.

DATED: April 6, 2018.

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